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October 2, 1997

William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: In the matter Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98

Dear Mr. Caton:

Enclosed for filing in the above-captioned proceeding please find an original and four copies of "Comments of MCI Telecommunications in Response to the Commission's Further Notice of Proposed Rulemaking." Also enclosed is an extra copy to be file-stamped and returned.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Jodie L. Kelley

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

COMMENTS OF MCI TELECOMMUNICATIONS CORP.
TO THE COMMISSION'S FURTHER NOTICE OF PROPOSED RULEMAKING

MCI Telecommunications Corp. (MCI) respectfully submits these comments in response to this Commission's Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Order on Reconsideration and Further Notice of Proposed Rulemaking (rel. Aug. 18, 1997) (Third Order on Recon. or FNPRM) . In the FNPRM, the Commission sought comment on whether "requesting carriers may use unbundled dedicated or shared transport facilities in conjunction with unbundled switching to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service." FNPRM at ¶ 61. As set out below, the Telecommunications Act requires that question to be answered in the affirmative.

BACKGROUND

In the Local Competition Order, the Commission determined that the ability of carriers to obtain access to unbundled network elements at forward-looking costs is critical to

opening markets to competition. In fleshing out specific unbundling requirements, the Commission concluded that, consistent with the statutory command, carriers are entitled to unbundled access to elements for the purpose of providing any telecommunications service including the origination and termination of interexchange services. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd. 13042 (1996) (Local Competition Order) ¶ 342 ("[C]arriers may request unbundled elements for purposes of originating and terminating toll services . .").

In the Third Order on Reconsideration, the Commission reiterated this conclusion and clarified it with respect to the transport element. The Commission found "that requesting carriers that take shared or dedicated transport as an unbundled network element may use such transport to provide interstate exchange access services to customers to whom it provides local exchange service." Third Order on Recon. ¶ 38. Moreover, these carriers are "entitled to assess originating and terminating access charges to interexchange carriers, and [are] not obligated to pay access charges to the incumbent LEC." Id. The Commission thus made clear that the ILECs' stranglehold on access could not stand in light of the commands of the 1996 Act.

In that Order, the Commission also issued a Further Notice of Proposed Rulemaking, asking for comment on whether there is any basis to restrict carriers' right to access to unbundled network elements if the carrier plans to use such transport to originate and terminate interexchange traffic to customers to whom they do not also provide local service. FNPRM ¶ 61. Thus, the only question presented is whether there is any legal or policy justification for grafting a limitation into the Act which does not exist -- a requirement that transport can be used to originate and terminate interexchange traffic to a customer only if the requesting carrier also

provides local service to that customer. As set out more fully below, no such justification exists.

ARGUMENT

I. The 1996 Act Does not Allow for Any Restrictions on Requesting Telecommunications Carriers' Use of Unbundled Transport.

Section 251(c)(3) of the 1996 Act requires incumbent LECs to provide to "any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis." The Commission has already determined that, on its face, section 251(c)(3) "permits interexchange carriers and all other requesting carriers, to purchase unbundled elements for the purpose of offering exchange access services, or for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers." Local Competition Order ¶356.

Indeed, the Commission found that this conclusion is "compelled by the plain language of the 1996 Act." Id. The Commission was correct. The Act defines "telecommunications carrier" as "any provider of telecommunications services . . ." 47 U.S.C. § 153(49). Interexchange carriers provide telecommunications services and are unquestionably telecommunications carriers. Shared and dedicated transport are network elements. The Commission so found in the Local Competition Order, ¶ 440, and reaffirmed this conclusion in the Third Order on Reconsideration, ¶¶ 21-23. And "interexchange services are telecommunications services." Local Competition Order ¶ 356. There is simply no argument consistent with the statutory language that would support a different conclusion. See id. (finding "no statutory basis upon which we could reach a different conclusion . . .").

Nor is there any plausible way to read into the statute a prohibition on a carrier's ability to purchase transport in order to originate and terminate interexchange traffic simply because the carrier does not provide local exchange service. Section 251(c)(3) is simple and unqualified. It does not mandate access to unbundled elements for the provision of a telecommunications service "only if local exchange service is also provided." It places no restriction whatsoever on the type of telecommunication service that can be provided through unbundled elements, including transport. It simply provides that if a telecommunications carrier requests access to an unbundled network element in order to provide a telecommunications service, the ILEC must provide such access in a nondiscriminatory fashion. A failure to allow a carrier unbundled access to transport because the carrier intended to use the transport only to originate and terminate interexchange traffic would be flatly inconsistent with the requirements of the Act.

II. Allowing Carriers to Purchase Transport as an Unbundled Element to Originate or Terminate Interexchange Traffic Furthers the Goals Articulated in the Access Reform Order.

In its Access Reform Order, the Commission recognized what is indisputably true -- access charges are currently inflated and do not reflect the true economic cost of providing access services. In the Access Reform Order the Commission chose to utilize competition to address this problem, adopting a "primarily market-based approach to reforming access charges." *In the Matter of Access Reform*, CC Docket No. 96-262, First Report and Order (rel. May 16, 1997) (Access Reform Order) ¶ 263. Competition in the access market, the Commission reasoned, should drive costs down to the true "forward-looking economic costs of providing interstate access services." Id. at ¶ 262.

If the Commission does not give IXCs the tools necessary to bring rational pricing to switched access services, however, its goal of reforming access charges will not become a reality. There is no question that the access market is not currently competitive. Competitive access providers (CAPs) provide some access alternatives in certain markets, but in the majority of markets, interexchange carriers have no access alternative and are forced to rely exclusively on the incumbent LEC to originate and terminate their traffic Although facilities-based CLECs may provide some competitive pressure on originating switched access, and vertically integrated IXCs may be able to self provision access for those customers who choose to purchase local service from the vertically integrated IXC, in the majority of markets facilities-based local competition, including local competition provided through the use of unbundled network elements, will, in all likelihood, be slow to develop. The pressure this competition may bring to bear on excessive switched access rates will also, therefore, be slow to develop. There is thus no reason to believe that such competition will create any real pressure on switched access rates in the near term. Consequently, unless interexchange carriers are provided with some alternative, they will continue to be forced to rely exclusively on the incumbent LEC to originate and terminate their traffic, and will similarly continue to be forced to pay the overly inflated rates the ILEC charges for such access.

It is precisely for this reason that the Act does more than remove legal prohibitions to competition, but instead mandates alternatives such as the use of unbundled network elements. In the absence of effective facilities-based local exchange competition, making unbundled shared transport available to IXCs will provide IXCs some alternative source of support for a portion of switched access, and therefore will help put some pressure on the transport portion of the

switched access rates of the incumbent local exchange carriers. This would create a potential alternative to the access services currently provided by incumbent LECs alone, directly furthering the Act's broad goal of promoting competition and the Commission's specific policy goal of using such competition to drive access to cost. This is precisely the result the Commission sought to achieve in the Access Reform Order.[1]

This is as true whether the carrier purchasing unbundled elements is a CLEC using unbundled elements to compete with the ILEC for access revenue, or an IXC using unbundled transport to originate and terminate traffic to a customer to whom it does not provide local service. In both cases, the use of unbundled elements allows non-incumbent carriers to use unbundled network elements in a way that drives access charges closer to economic cost and allows for meaningful competition to develop.

III. No Other Factor Supports Restricting Carriers' Use of Transport.

In the FNPRM, the Commission requested comment on whether the use of transport for the transmission of access traffic is consistent with the Commission's Order on Reconsideration. FNPRM ¶ 61. It also requested comment on the effect on its transport analysis of "recent appellate court decisions interpreting section 251(c)(2) and (c)(3)," in particular Competitive Telecommunications Ass'n. v. FCC, 117 F.3d 1068 (8th Cir. 1997) (CompTel) and Iowa Utilities Bd. v. FCC, No. 96-3321 (8th Cir. 1997) (IUB). Id.

[1]In the Access Reform Order, the Commission again recognized that Congress had required access to unbundled elements at cost-based rates as a means to facilitate competition, and that "interstate access services can be replaced . with functionality offered by unbundled elements." Access Reform Order at ¶ 262.

In its Order on Reconsideration, the Commission highlighted practical constraints on carriers' ability to use two elements -- the loop and the switch -- to provide only interexchange access. The practical problem identified was that of the "dedicated user." As the Commission noted in the Local Competition & Order, because "carriers purchase rights to exclusive use of unbundled loop elements," as a practical matter the carrier that provides the local loop will have to provide all services that the local customer needs which will, as a practical matter, include local exchange service and exchange access service. Local Competition Order ¶ 357.

In the Order on Reconsideration, the Commission indicated that the same was true with regard to the local switching function. Order on Recon. ¶11. Because "a carrier that purchases the unbundled local switching element to serve an end user effectively obtains the exclusive right to provide all features, functions and capabilities of the switch," that carrier obtains the features, functions and capabilities necessary for switching exchange access and local exchange service. Id. Thus, "as a practical matter, a carrier that purchases an unbundled switching element will not be able to provide solely interexchange service or solely access service to an interexchange carrier." Id. at ¶ 13.

It is clear, however, that the same practical problem does not exist with respect to unbundled transport. Dedicated transport moves the traffic of one customer, or many customers, to or from designated points in a carrier's network, including, critically, from a POP to an end office. The service provided over that transport is the transport portion of originating or terminating access. An IXC purchasing such dedicated transport as an unbundled element would, therefore, provide all services typically provided over that element; indeed if an IXC purchases dedicated transport in order to originate or terminate its own interexchange traffic, the IXC would

simply be using the dedicated transport facility in the same manner the ILEC currently does. The practical problem the Commission has identified with respect to loops and the switching function simply does not exist.

Nor does shared transport present the "dedicated user" problem the Commission has identified with respect to loops and switching. Shared transport "encompasses a facility that is shared by multiple carriers, including the incumbent LEC," Third Order on Recon. ¶22, and is therefore, by definition, not dedicated to a particular end user. Indeed, the Commission expressly recognized that, in contrast to loops that "are provided exclusively to one requesting carrier" which uses the loop to serve a given customer, shared transport "necessarily must be shared among the incumbent and multiple competing carriers" and will necessarily be used to serve many customers. Id. at ¶ 41. Thus, no practical impediment exists that would preclude carriers from utilizing transport facilities to the full extent allowed by the Act. The approach outlined in the FNPRM is wholly consistent with the Commission's Order on Reconsideration.

No recent appellate decision suggests a different conclusion. The CompTel decision dealt with the interconnection requirement of section 251(c)(2), not the unbundling requirement found in section 251(c)(3). In CompTel, the court upheld the Commission's determination that the term "interconnection" as used in section 251(c)(2) means only the "physical linking of two networks for the mutual exchange of traffic." Local Competition Order ¶ 176. In discussing the reasonableness of the FCC's interpretation, the Court did note that, under the FCC's interconnection rules, "LECs will continue to provide exchange access to IXCs for long-distance service, and continue to receive payment, under the pre-Act regulations and rates." CompTel, 117 F.3d at 1074. That statement merely restates what the Commission

determined with respect to interconnection in the First Report and Order, and says absolutely nothing about the Commission's determination in the same order that, under the express terms of the Act, unbundled elements can be used in the provision of interexchange services.

Nor does anything in the Court's decision in IUB v. FCC suggest that the Commission must, or should, impose restrictions on the services carriers may provide through the use of unbundled transport. The footnote identified by the Commission is not germane to the question at issue here -- in that footnote the Court merely explained that, in its view, the FCC's jurisdiction to regulate access charges does not imply that it also has jurisdiction to set the rates for interconnection and unbundled access. Even if the Eighth Circuit were correct about the FCC's jurisdiction over pricing, that would not impact the question of what services carriers are entitled to use transport to provide. As the Commission correctly noted in the Local Competition Order, its "authority to set rates for [access] services is not limited or affected by the ability of carrier to obtain unbundled elements for the purpose of providing interexchange services." Local Competition Order ¶ 358.

CONCLUSION

The Commission should determine that a carrier purchasing unbundled transport can use that transport to provide any telecommunications service, including interexchange service, regardless of whether it provides local exchange service to a given customer.

Respectfully submitted,

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